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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 102

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Mutual Life Insurance Company of New York prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above entitled case on March 3, 1953.

Opinion Below

The opinion of the United States Court of Claims is reported at 110 F. Supp. 606.

Jurisdiction

The judgment of the United States Court of Claims was entered on March 3, 1953 (R. 14).* The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1255; 62 Stat. 928.

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* Reference are to numbered pages in the transcript of record.

Questions Presented

Whether documentary stamp tax liability under section 3482 of the Internal Revenue Code—which imposes a tax on conveyances of "realty sold"—is incurred when the holder of a defaulted mortgage loan accepts a surrender deed of the mortgagor's nominal equity in the mortgaged real estate, subject to an effective stipulation for continuance of the mortgage lien?

Whether, if such a deed is taxable at all, the stamp tax may properly be computed, as it has been below, on the amounts yet to be recovered by the lender, including amounts for which the lender has no enforceable remedy, and without deduction for mortgage liens found to have been duly continued in force beyond the conveyance, in accordance with local law?

Whether additional stamp tax under section 3482, measured by the amounts unpaid on a mortgage, may lawfully be imposed upon a mortgagee which accepts a conveyance of the mortgaged real estate, subject to an effective stipulation for continuance of the mortgage and under an agreement to rehabilitate an obsolete building and to reconvey the property to the borrower upon completion of work, subject to the original mortgage, with an additional mortgage to be given equal to the costs of the rehabilitation, such agreement of the mortgagee having been in all respects performed?

The Statute Involved

A documentary stamp tax on conveyances of realty sold, has been in force continuously since June 21, 1932. On that date an amendment to Title VIII (Stamp Taxes) of the Revenue Act of 1926 (44 Stat. 99) took effect, adding to the taxable list:

> "8. Conveyances: Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July

1, 1934 (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt." (Added June 6, 1932, c. 209, § 725, 47 Stat. 275).

Such subdivision 8, after extension from time to time of its effective period (48 Stat. 254; 49 Stat. 431; 50 Stat. 358), became section 3482 of the Internal Revenue Code (1939); 53 Stat. 425, 862. The only changes from the text above quoted were that the words "delivered before July 1, 1941" replaced "delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1934"; and that the word "section" replaced "subdivision" in the final sentence.

In 1940 (54 Stat. 522, 523) the taxable period was further extended (to July 1, 1945) and the rate changed from 50 to 55 cents per taxable unit. The 1941 Revenue Act (55 Stat. 706, 707) removed all expiration date from the section, and retained 55 cents per unit as a permanent tax rate.

Otherwise the statute remains as it was enacted in 1932. The 1932 statute is a repetition of the one in force during and immediately following World War I (40 Stat. 1057, 1133, 42 Stat. 301, 43 Stat. 333, 335).

Statement of Facts

This case was brought in the Court of Claims to recover $11,769 paid for United States documentary stamps which

the Collector of Internal Revenue for the Second District of New York, required the petitioner to purchase with respect to 44 real estate conveyances which had been made to it.

The case is concerned solely with the stamp tax on conveyances of "realty sold". It has nothing to do with the income tax status of any of the parties to the conveyances mentioned.

Petitioner is a life insurance company, with substantial investments in real estate mortgages. At all times here involved, the petitioner was under a statutory duty (currently expressed in New York Insurance Law, Section 81(7)) to liquidate within a limited period whatever real estate it might be compelled to acquire through defaults in its lending activities.

With one exception which will be separately discussed, the conveyances above mentioned were made by mortgagors whose loans had gone into default and who were abandoning their properties (R. 28, Finding 3). At the instance of such defaulting mortgagors, the petitioner accepted instruments of conveyance, formally disclaiming the further existence of whatever equities the mortgagors may have had in the properties.

In accord with the practice in the New York City area to keep mortgages alive until actual repayment of the indebtedness, each conveyance contained language appropriate to prevent merger of the mortgage in the fee title (R. 21, 28; Findings 8, 20). There were two reasons of long standing for this: (1) to assure the relating back of the lender's rights against the land to the date of the original lending; (2) to render the distressed property as attractive as possible to purchasers through minimizing the acquisition costs a purchaser would have to meet. (A newly created purchase money mortgage, for example, would be subject to a heavy recording tax, imposed in New York

since 1906 (N. Y. Tax Law § 253), customarily borne by the mortgagor; *Seamen's Bank* v. *McCollough*, 221 N. Y. 692, affirming 166 App. Div. 271). The effectiveness of the non-merger stipulations and their acceptance by the local title insurers were found by the Court in such Finding No. 20.

Subsequently the Collector required petitioner to purchase documentary stamps equivalent to the total remaining unpaid on each defaulted loan at the time petitioner accepted the deed. In some instances the stamps thus required to be purchased amounted to more than $1000 per instrument. (R. 20, 24, 25).

Notwithstanding that no boot was paid for the conveyances,[1] the Court below held each transaction taxable, and concurred in the measuring of the tax by the total amount remaining unpaid on the mortgage loans.

As the Court also found, by the time the petitioner accepted each of the conveyances in this case, petitioner had ascertained there was no reasonable possibility of further recovery, except out of the real estate on which the petitioner already held its lien. Where collateral facts had indicated a basis of recovery from anybody liable upon the loan, a deed was not accepted until the debt was appropriately reduced (R. 22, 23, 24, Findings 9, 10).

For periods beginning in 1933 and continuing until various dates in 1947-1950, mortgage moratorium legislation was kept in force in New York (N. Y. Civil Practice Act, §§ 1077-a through 1077-g, 1083-a, 1083-b). This legislation, as the Court below found, was so administered as to permit no recovery on the personal undertakings of resident borrowers wherever (as here) the municipal taxing authorities carried the mortgaged real estate on the assessment rolls

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[1] In only four cases of the 44 was some minor sum paid the grantor because of a grantor's charter limitation or other non-meritorious reason; stamps that had been affixed relating to such sums are not in controversy (R. 19, 27, Findings 4, 17).

at a valuation greater than the mortgage debt (R. 22, 23, Findings 9, 10). In short, in the situations here concerned, by the time the petitioner received the deeds, the loans in any event were already no-personal-liability transactions by force of legislation. Those situations in which the petitioner, in connection with the conveyance, gave no one an undertaking that he would not be sued, were in effect no different from those in which the grantor received a formal assurance that he would not afterwards be sued (R. 22-27, Findings 9-16).[2]

The instance which involved the largest amount of additional stamps ($1772.65) was the one item not an abandonment by a mortgagor. There, the owner of a property impaired by obsolescence, conveyed the property to the petitioner, subject to a first mortgage of $1,623,358. This was done under an agreement that the petitioner would make a major building improvement and upon completion of work re-convey the real estate to the borrower, subject to the existing mortgage and take a new mortgage for the cost of the rehabilitation. The Court found the transaction had been carried out as agreed and that the first mortgage was never satisfied or discharged (R. 27, 28, Finding 18). Yet it upheld the requirement for additional stamps measured by the principal of the undisturbed first mortgage and the interest accrued thereon.

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[2] As the cited findings show, in some six of the transactions, the petitioner accepted the deed and issued no sort of assurance against suit to the grantor. In the remaining instances, the grantor was given a covenant not to sue, though as to 23 of the loans persons other than the grantor had also undertaken liability. The same statutes which had limited the lender to resort to the land prior to the acceptance of the surrender deeds and which led plaintiff to accept those deeds, equally ruled out any monetary recovery after acceptance of surrender deeds including those providing for continuance of mortgage encumbrances. (*Central Hanover Bank* v. *Roslyn Estates, Inc.*, 266 App. Div. 244, 249, affd. 293 N. Y. 680).

The Error Below

THE REQUISITE FOR A SALE OF REALTY WAS OVERLOOKED.

The Court of Claims did not purport to find a sale of real estate in any of the situations here presented.

The Government in its brief to that Court aptly characterized the various conveyances to the petitioner as made "to effect a formal transfer of the mortgagor's equity in the property." But Congress has enacted no stamp tax on mere passings of title, on formal transfers. The subject matter of the statute has always been, and continues to be, conveyances of "realty sold"—with a computation to be based upon the existence or non-existence of liens and encumbrances "at the time of sale."

The formal conveyances here concerned, all made expressly subject to the continuance of the several mortgage liens, fall clearly without the scope of Section 3482. They do not have to do with conveyances of realty sold. Rather they are in the nature of a further assurance to the holder of the defaulted mortgage obligation. As such, their nontaxability is dictated not only by the lack of sale but by the concluding sentence of Section 3482: "This section shall not apply to any instrument or writing given to secure a debt."

In the Court below, an excise on real estate sold for more than $100 in excess of subsisting liens, has been distorted into a tax on money loaned but not recovered. To the extent of the defaulted mortgage lien, the land was plainly not the debtor's to sell.

If a mortgage borrower performs his promise to repay, even if the repayment be evidenced by an instrument of conveyance of real estate, the Government claims no documentary tax (Regs. 71, 1941 Edition, Sec. 113.84(a)).

But when, as here, the lender is faced with the necessity of looking to its security if it is to have any recovery at all, the

Government would tax, as it occurs, each step in the collection of the defaulted debt. The lender, upon accepting a formal admission of lack of equity over its mortgage, has been taxed upon the full amount of the sums owing on the unpaid loan.

When the lender succeeds in inducing someone to assume proprietorship of the real estate, there is a clear further tax on such conveyance. Unless the lender has been fortunate enough to obtain all cash from its grantee, the lender will still have seen little, if any, of the money it loaned, yet will already have been taxed twice under Section 3482.[3]

How far from reality the Court below wandered is made evident by its discussion of situations involving some $3250 of the stamps in question, in which the Court found the Petitioner merely received the deed and gave no undertaking to abstain from suing the grantor (R. 26, 27, Findings 15, 16). The Court took the view that those conveyances were to be deemed made in full payment of the debt, regardless of the non-merger stipulation in such conveyances. Then, in an endeavor to support taxing the payment of a debt, the Court asserted there was a "consideration" for the conveyance, viz., the money the lender had previously paid out in the form of the loan itself. In short, the Court approached the case as if the several grantors were being proceeded against by other creditors on claims that these grantors had given away assets in fraud of general creditors.

When a debt is paid, whether in whole or in part, the creditor does not "purchase" the payment. (*Fairbanks* v. *U. S.*, 306 U.S. 436, 437; *Bingham* v. *Commissioner*, 105 F. 2d 971;

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[3] Had the petitioner gone through with foreclosure, under the New York practice it could have foreclosed subject to the continuance of all unmatured portions of the mortgage lien (N.Y. Civil Practice Act, Sections 1081, 1084-1086) and bid in the real estate on a customary nominal bid. Only if such bid exceeded $100 would the Government have claimed tax, and then only on the amount of the bid—not the debt (Regs. 71 (1932) Art. 78, 1941 Edition, Sec. 113.83(d)).

Lee v. *Commissioner*, 119 F. 2d 946, 948. In the case of a transfer of mortgaged real estate to a lender, even in return for an express cancellation of the evidences of loan, no "sale" results. It is the "mere winding up of, and a realization of loss on, a bad debt transaction" (*Commissioner of Internal Revenue* v. *National Bank of Commerce*, 112 F. 2d 947). In the present case, even if the stipulations for continuance of the mortgage liens were not good (as they clearly are under New York law; *Central Hanover Bank* v. *Roslyn Estates, Inc.*, 266 App. Div. 244, 249; affd. 293 N.Y. 680), the situation would merely be one of partial payment in land, with no remedy on the lender's part for the rest of the debt, because of the moratorium. In this, there would be neither purchase nor sale.

Again, the formal giving up by a lender in exchange for a borrower's deed, of something of no actual worth, gives rise to no "sale or exchange", even in the unusually broad sense in which those terms are used in the capital gains and losses provisions of the Federal income tax statutes (*Commissioner* v. *Spreckles*, 120 F. 2d 517; *Polin* v. *Commissioner*, 114 F. 2d 174, 176, involving a release from an unenforceable personal liability in a mortgage transaction.

For purposes of the grantor's ability to take an ordinary income tax loss, the mortgage borrower who finds his equity gone, can still relinquish the realty in such fashion as to be entitled to a fully deductible, as distinguished from a mere capital, loss. The means to this end is abandonment of the security to the creditor (*Stokes* v. *Commissioner*, 124 F. 2d 335; *Commissioner* v. *Hoffman*, 117 F. 2d 987; *Crane* v. *Commissioner*, 153 F. 2d 504, 506 affd. 331 U.S. 1).

The Court of Claims treated lack of personal liability as equivalent to cancellation of mortgage indebtedness. This holding is based on a theory contrary to *Commissioner* v. *Crane*, 153 F. 2d 504, affd. 331 U.S. 1, where it was held that

the lack of personal liability has no such effect. The language of the Circuit Court clearly illustrates the point:

> "The mortgagee is a creditor, and in effect nothing more than a preferred creditor, even though the mortgagor is not liable for the debt. He is not the less a creditor because he has recourse only to the land, unless we are to deny the term to one who may levy upon only a part of his debtor's assets." (p. 506)

THE STATUTORY REQUIREMENT FOR AN ALLOWANCE FOR LIENS WAS IGNORED

The result below disregards the direction in section 3482 for deduction of any lien or encumbrance remaining on the property at the term of sale. The statutory language is clear that "any lien or encumbrance remaining thereon" must be deducted in ascertaining whether real estate has been sold for a taxable price. No requirement beyond "any lien or encumbrance remaining thereon" is to be found in the statute. The exclusion is not confined to a lien or encumbrance which is supplemented by a personal obligation to pay. *Any* valid lien or encumbrance meets the statute.

In its opinion, the Court below pointed out "The mortgage remained on the property notwithstanding the conveyance" (R. 16). That was clearly so under New York law, and the moratorium legislation made no difference in that rule (*Central Hanover Bank and Trust Co.* v. *Roslyn Estates, Inc.*, 266 App. Div. 244, 249; affirmed, 293 N. Y. 680). The Court of Claims specifically found the continuance of the mortgage liens (R. 28, Finding 20), yet went on to disregard them. Under an earlier stamp tax statute, which contained no direction for exclusion of liens, Chief Justice (then Circuit Judge) Taft rejected a Government contention that deeds were to be taxed as if the real estate were being conveyed free of existing mortgages (*Central Trust Co.* v. *Columbus, H. V. & T. Ry. Co.*, 92 Fed. 919, 920). Here, there is the clearest Congressional direction for

exclusion of "any lien or encumbrance". To follow the Government's contention would be to sanction administrative repeal.

THE REGULATION DISCUSSED WAS MISTAKENLY APPLIED

This is the first time a Court has undertaken to construe and apply Article 112 of Treasury Regulations 71 (revised July, 1932). If the Article means what the Court below says, it is in clear conflict with an unambiguous statute and invalid (*Louisville & N. R. Co.* v. *U. S.*, 282 U. S. 740, 757-59).

The construction below would put Article 112 at war with all its surroundings. Article 112 is but one of 44 illustrations of the application of the conveyance stamp tax statute. An excerpt presenting the tenor of those Regulations appears in the Appendix. Throughout those Regulations, strained constructions have been avoided. In article after article, that set of Regulations points out that the taxing statute does not reach conveyances made otherwise than as part of what is commonly recognized as a sale of real property.

Article 112 says "A conveyance by defaulting mortgagor to mortgagee in consideration of the cancellation of mortgage debt is subject to tax calculated on the amount of the mortgage debt plus unpaid accrued interest." The Article is addressed to an instance of cancellation of debt, not collection nor payment. It expresses the measure of tax where a conveyance of real estate is made in a true cancellation transaction, viz., a transaction in which other real estate, not the originally mortgaged real estate, is conveyed to the creditor. In the case at bar we have not cancellation but assertion of and concurrence in the secured creditor's position. Collection and cancellation are direct opposites.

In the 1941 rearrangement of Regulations 71 (the only revise since 1932 so far as the conveyance tax is concerned), the opening section points out: "The tax is limited to con-

veyances of realty sold and does not apply to other conveyances." This revise will be seen to consist of a regrouping of the existing numerous short paragraphs into five relatively long sections without attempt to alter substance. The material portions of the 1941 rearrangement appear in the appendix.

The World War I Instructions to Collectors, which were formalized in Regulations 71 and its predecessor, Regulations 55, constitute the final item in the appendix. The early language is still to be found in the Regulations.

Article 112 can, and should, be read in subordination to the statute.

Reasons for Allowance of the Writ

THE NEED FOR CLARITY AND CERTAINTY

The documentary stamp tax on conveyances has been continuously in force for 21 years and no longer is in the form of temporary legislation. It is a statute of frequent application. Though defaulted real estate loans are not as common as they were a dozen or more years ago, they, too, are encountered no matter how high the general level of prosperity.

There is peculiar need for definite standards in a stamp tax enactment. Persons subject to such a tax need to know the measure of their liability and need to know it at the time an instrument is executed and delivered. The conscientious taxpayer should not be continuously exposed to penalty and restatement of liability long after a transaction has been completed.

CONFLICT WITH OTHER HOLDINGS

In *United States* v. *Seattle-First National Bank*, 321 U. S. 583 (1944), this Court gave strong indication that in applying the stamp tax upon conveyances, such terms as "sold" and "purchaser" were to be given "ordinary meanings"

(pp. 589-90). In that case, the Government had sought to sustain an imposition of stamp tax on the theory that an agreement of consolidation between two banking corporations constituted a conveyance. That contention was unanimously rejected, this Court adhering to the view that the real estate involved became vested in the consolidated corporation through operation of law. While the agreement of consolidation was the voluntary act of the two boards of directors, the passing of property as the result of the decision to consolidate was viewed as a legal incident thereto, in no true sense a conveyance of "realty sold". That is the nearest determination of this Court to the problems presented in the instant case.

Here, the Court of Claims has disregarded the *Seattle Bank* case, choosing instead to follow an earlier determination by a divided bench in the Circuit Court of Appeals for the Second Circuit, *Railroad Federal Savings & Loan Association* v. *United States*, 135 F. 2d 290. The *Railroad* case had to do with conveyances by defaulting mortgagors to their mortgagee. The Circuit Court did not discuss the question whether any "realty sold" was involved. Judge Learned Hand, in his dissent (p. 293), indicated, but without developing, that he would hold the conveyances taxable only to the extent of whatever cash in excess of $100, the lender there had given to obtain delivery of the deeds. The majority said they would presume (p. 293) that the lender had given up something worth the full amount of each debt—which must have meant that all the real estate conveyed was worth zero. They upheld the Commissioner because of alleged lack of proof in the stipulation of facts to overcome the presumption the Court had erected without regard to the subject matter of the statute it was purporting to construe. In the case at bar, the petitioner established and the Court found that the petitioner had no right to further recovery on any of the loans over and above (a) its mortgage

interest in the real estate and (b) whatever cash the petitioner had been able to obtain in reduction of the loan prior to accepting the deed (R. 16, 22, 23, Findings 9, 10).

There is conflict, which should be resolved, between the holdings that sale in an ordinary sense is the prerequisite to application of this taxing statute, and the holdings in the *Railroad* case and in the case at bar, which, if the lender is unable to make full collection, base the tax not on sale but on the entire amount of the debt.

There is conflict between the holding below and the decision of the Sixth Circuit in *Berry* v. *Kavanaugh*, 137 F. 2d 574, where the opinion of Hamilton, C. J., writing for an unanimous bench, says:

> "The tax provided in Section 3482 of the Internal Revenue Code is an excise upon the privilege of selling lands, tenements or other realty. The burden of the tax attaches when the property is sold. Usually the word 'sold' means the transfer of title or an agreement to transfer subsequent for a consideration. Whether a taxable sale occurs depends upon the intention of the parties gathered from their whole writing when giving to the words and phrases used, their ordinary signification.
>
> * * * * * * *
>
> If Congress had intended to levy on every transfer of title it could have expressed its purpose in a sentence, but it is clear from the language of the section that it intended to confine the tax to actual sales." (pp. 575, 576)

There is conflict, too, with these further stamp tax holdings which distinguish sales of real estate and transfers not involving sales:

Murray v. *Hoey*, 32 F. Supp. 1008;
Socony-Vacuum Oil Co. v. *Sheehan*, 50 F. Supp. 1010;
United States v. *Niagara Hudson Power Corp.*, 53 F. Supp. 796.

THE SUGGESTION THAT THE GOVERNMENT MAY PICK ANY OF THREE ALTERNATIVE TAX BASES

In the case at bar, the Court of Claims has put forward a further notion disruptive of orderly enforcement of the tax on conveyances. It has viewed the tax as measurable, at the Government's option, either by (1) the consideration for the transfer (not sale, it will be noticed) or by (2) the value of the interest conveyed or by (3) the value of the property conveyed (R. 26). In so doing it has conformed with a notion expressed in *Orpheum Building Co.* v. *Anglim*, 127 F. 2d 478, 480-481, a Ninth Circuit determination which shortly preceded this Court's call for practicable construction in the *Seattle Bank* case.

This three-pronged approach to tax liability would in any event leave taxpayers always in the air. Especially is this true in the case of larger properties, as to which there can readily be substantial divergences of view as to value. Even if a taxpayer does obtain a current expert opinion, he has no assurance that within the next several years the Government won't proceed against him on some other theory of value. If administration of this tax is to accord with the needs of business, "value" must be treated as the basis only in the exceptional case where property is sold for a price not otherwise measurable, for example, on an agreement for life maintenance of the grantor.

There is presented a case calling for the exercise of this Court's power of supervision. The writ prayed for should be allowed.

May, 1953

Respectfully submitted,

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APPENDIX "A"

REGULATIONS 71 (REVISED JULY, 1932) RELATING TO STAMP TAXES

CHAPTER VIII

Deeds of Conveyance

ART. 77. Tax, how computed.—In calculating the amount of stamps which must be affixed to a deed of conveyance, the tax is computed upon the full consideration for the transfer less all encumbrances which rest on the property before the sale and are not removed by the sale. Encumbrances placed on the property in connection with and as a result of the sale or transfer, as well as notes for deferred payments, can not be deducted in determining the amount upon which tax is calculated.

ART. 79. "Sold" defined.—The term "sold" imports the transfer of the absolute or general title for a valuable consideration or price.

ART. 87. Conveyance of land in consideration of maintenance.— A conveyance of land in consideration of life maintenance is taxable, the tax to be measured by the value of the property or interest conveyed.

ART. 90. Quit-claim deeds.—A quit-claim deed given for no consideration, or merely the nominal consideration of $1, for the purpose of correcting a flaw in title is not subject to tax.

ART. 92. Deeds of release and deeds of trust.—Deeds of release and deeds of trust are not subject to tax,

ART. 96. Deed to cover gift.—A deed issued to cover a pure and bona fide gift of property from husband to wife, or from parent to child, or from an individual to a municipality or other political subdivision, or to the United States, wherein the consideration named is "natural love and affection and $1", "desire to promote public welfare and $1," or "$1 and other valuable consideration" is not taxable.

ART. 102. Partition deeds.—Partition deeds are not subject to tax unless a consideration passes between the parties by reason of one or more of them taking under the division a share of real estate of greater value than his undivided

interest, in which event stamp tax attaches to the deeds conveying such greater shares, calculated upon the value of such consideration.

ART. 103. Conveyances without consideration.—Conveyances of realty, not in connection with a sale, to trustees or other persons without consideration are not taxable.

ART. 105. Deeds confirming title.—Deeds that are simply confirmatory and do not vest title not already vested are exempt from tax.

ART. 111. Conveyance by corporation to owner of all the capital stock.—A conveyance of real estate by a corporation without valuable consideration to an owner of all its capital stock in consequence of its dissolution is not subject to tax.

ART. 112. Conveyance by mortgagor to mortgagee.—A conveyance by defaulting mortgagor to mortgagee in consideration of the cancellation of mortgage debt is subject to tax calculated on the amount of the mortgage debt plus unpaid accrued interest.

Reg. 71 (revised 1941).

Sec. 113.80. Scope of tax.—Section 3482 imposes a tax upon deeds, instruments, or other writings (unless deposited in escrow before April 1, 1932), whereby realty sold is granted, assigned, transferred, conveyed to, or vested in, the purchaser or, at his direction, in any other person, when the consideration for, or value of, the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100. (See section 113.82.)

The tax is limited to conveyances of realty sold and does not apply to other conveyances. (See Section 113.81 (b).) The tax accrues at the time the deed or other instrument of conveyance is delivered, irrespective of the time when the sale is made.

Deeds deposited in escrow become subject to the tax upon delivery to the grantee, unless deposited in escrow before April 1, 1932.

A conveyance of realty subject to an equity of redemption is taxable when made, not when the time for redemption expires.

The statute expressly exempts from the tax any instrument or writing, such as a mortgage, given to secure a debt.

Sec. 113.81. Definitions.—As used hereinafter in this subpart—

(a) The term "deed" includes any instrument or writing whereby realty is assigned, transferred, conveyed to, or vested in, the purchaser or, at his direction, in any other person.

(b) The term "sold" imports transfer of title for a valuable consideration which may involve money or anything of value.

Sec. 113.82. Rate and computation of tax.—The rate of tax is 55 cents on each $500 or fractional part thereof of the net consideration paid for, or the net value of, the realty conveyed, that is, the gross consideration or gross value less, in either case, the amount of all liens or encumbrances on the realty existing before the sale and not removed thereby.

The tax is based upon the net consideration where it is definite in amount, or may be definitely determined.

The tax is based upon net value where the amount of the consideration is indefinite, or is left open to be fixed by future contingencies.

In determining the amount of the net consideration for, or net value of, the realty conveyed, only the amount of the liens and encumbrances on the property existing before the sale and not removed thereby may be deducted. Thus, for example, taxes or assessments which are liens on the property before the sale and are not paid at the time of sale are deductible. No deduction shall be made on account of any lien or encumbrance placed upon the property in connection with the sale, or by reason of deferred payments of the purchase price whether represented by notes or otherwise.

Sec. 113.83. Conveyances subject to tax.—The following are examples where the tax applies:

* * * * * * *

(c) A conveyance by a defaulting mortgagor to the mortgagee in consideration of the cancellation of the mortgage debt. The tax is computed on the amount of the mortgage debt plus unpaid accrued interest.

(d) Deeds given by masters in chancery, sheriffs, clerks of court, etc., for realty sold under foreclosure or execution. The tax is computed on the amount bid for the property plus the costs if paid by the purchaser, whether the purchaser is the mortgagee or judgment creditor, or any other person.

* * * * * * *

Sec. 113.84. Conveyances not subject to tax.—In addition to the various exemptions prescribed in section 1808, and the Bankruptcy Act as amended (as to which see Subpart J), the following are examples where the tax does not apply:

(a) The conveyance of realty to secure a debt; also the reconveyance of such realty upon payment of the debt.

(b) Conveyances of realty without consideration and otherwise than in connection with a sale, including a deed conveying realty as a bona fide gift, although the deed may recite a consideration for the transfer, such as "natural love and affection and $1," "desire to promote public welfare and $1," or "$1 and other valuable consideration"; a gift of realty by a husband to his wife accomplished through the conveyance of the property for an ostensible consideration to a "straw man" who immediately reconveys the property to the wife; and a deed to or by a trustee not pursuant to a sale.

(c) A deed to confirm title already vested in the grantee, such as a quitclaim deed to correct a flaw in title.

* * * * * * *

(g) Partition deeds, unless, for consideration, some of the parties take shares greater in value than their undivided interests, in which event a tax attaches to each deed conveying such greater share computed upon the consideration for the excess.

* * * * * * *

APPENDIX "B"

Commissioner of Internal Revenue

December 3, 1917

To Collectors of Internal Revenue and Others Concerned:

The following synopsis of decisions of the Commissioner of Internal Revenue on questions relating to war stamp taxes imposed by sections 800 to 807 of the war-revenue act of October 3, 1917, is published for the information of revenue officers and others concerned.

* * * * * * *

Conveyances, Deeds, etc.—On an instrument conveying real estate there should be attached a tax stamp of the face value corresponding with the amount representing the vendor's equity conveyed. Where an exchange of equal equities in real estate is made between two persons a tax stamp should be attached to each of the two deeds corresponding with the amount of each equity exchanged. In determining the amount of incumbrance upon real estate being transferred, no consideration is to be given to new incumbrances placed upon same at the time of, or after, the sale. Only incumbrances which rest on the property before the sale and which are not removed by the sale are to be taken into consideration."

* * * * * * *

DANIEL C. ROPER,
Commissioner of Internal Revenue.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 102

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 14-29) is reported in 110 F. Supp. 606.

JURISDICTION

The judgment of the court below was entered March 3, 1953. (R. 29.) The petition for a writ of certiorari was filed June 1, 1953. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1255.

QUESTION PRESENTED

Whether documentary stamp tax liability is incurred within the meaning of Section 800, Schedule A 8, of the Revenue Act of 1926 and Section 3482 of the Internal Revenue Code, where deeds to various parcels of real estate are made to the mortgagee of the properties by the respective mortgagors for the purposes of avoiding foreclosure proceedings and of effecting a transfer of the mortgagors' legal and equitable title therein.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 12-15.

STATEMENT

The special findings of fact of the Court of Claims (R. 19-28) may be summarized as follows:

The taxpayer is a New York corporation engaged in the business of life insurance. In connection with this business, it invests its funds in first mortgage loans upon real estate. (R. 19.)

Between the period February 2, 1938, and December 31, 1941, the defaulting mortgagors of 46 separate parcels of real estate conveyed by deed to the taxpayer the title to their respective properties in lieu of the foreclosure of the first mortgages held by the taxpayer thereon (R. 19.)

In a few instances, a cash consideration was paid to the mortgagor by the taxpayer upon the delivery of the deed to the latter, and documentary stamp tax in the total amount of $79.60 was computed upon the cash payments and stamps affixed to

the deeds. This amount is not in controversy. (R. 19.)

~~deeds. This amount is not in controversy (R. 19).~~

As a result of an investigation by the General Deputy Collector an additional stamp tax liability of $11,820 [1] was determined upon the conveyance effected by the 46 deeds in lieu of foreclosure proceedings, which liability was computed upon the amount of the mortgage debt, plus accrued but unpaid interest thereon, and any additional consideration paid to the owner of the property upon which the stamp tax had not theretofore been paid (R. 19-20). On all similar transactions subsequent to these 46 conveyances, the taxpayer affixed documentary stamps upon the deeds, used in lieu of foreclosure proceeding for the purpose of conveying the property to it (R. 20).

Upon receipt of the deeds to the properties from the defaulting mortgagors, the taxpayer immediately recorded the titles to the properties in its own name. The deeds contained a clause reciting that the mortgage shall not merge with the fee. Thereafter, in a number of instances, the taxpayer sold the properties and took back purchase money mortgages. Although these were new transactions, a new mortgage was not issued but the previous mortgage was renewed, modified, or extended. The reason for this procedure was to save the New York State tax imposed upon the issuance of new mortgages. (R. 21.)

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[1] At the trial, petitioner withdrew its claims on two deeds, reducing the number of conveyances involved to 44, and the amount sought to be recovered to $11,769 (R. 21).

taxpayer, in computing the profit or loss thereon.

Upon the subsequent sale of these properties the for federal tax purposes, used as a cost basis the amount of the mortgage, plus any outside costs at time of acquisition, offset by any sums paid to the taxpayer and the reserve value of the property. (R. 23.)

During the period here involved, Sections 1083-a and 1083-b of the New York Civil Practice Act prevented a mortgagee from obtaining a deficiency judgment against a defaulting mortgagor if the court found that the fair and reasonable market value of the mortgaged premises exceeded the mortgage debt. The courts generally used the assessed value as the fair and reasonable market value of the property and denied a deficiency judgment if such value exceeded the mortgage debt. (R. 16, 22.) The assessed value of the properties here involved exceeded the mortgage debt thereon (R. 22).

During the period here involved, the taxpayer set up an interoffice policy to be followed in all cases where mortgages were in default and where no adjustment could be worked out with the owners of the property. Taxpayer's real estate department would request an opinion from its legal department as to the possibility of securing a deficiency judgment. In each of the 44 cases here involved, the opinion of the legal department was that no deficiency judgment could be obtained against the defaulting mortgagors for the reason that the assessed valuation of the properties exceeded the amount of the mortgage indebtedness and the courts would not grant a deficiency judg-

ment under those circumstances. However, in some instances, taxpayer received sums through negotiations with collateral bondsmen on the mortgages, and these sums were used to reduce the amount of consideration paid for the conveyances. (R. 22, 23.)

In all of the conveyances here involved except five, the taxpayer released the defaulting mortgagors from any liability on the mortgage debt or gave covenants not to sue for deficiency judgments. While five mortgagors and other obligors were not released, in no instance were any proceedings instituted by the taxpayer to obtain a deficiency judgment against either the grantors or any collateral bondsmen in connection with these 44 conveyances of property. (R. 23, 26-27.)

The taxpayer being an insurance company, the laws of the State of New York require it to sell within a limited time all property acquired through foreclosure proceedings or in lieu of foreclosure (R. 28).

The Court of Claims held that documentary stamp taxes in the amount of $11,769 were properly collected from the taxpayer with respect to the 44 conveyances of property (R. 14-19) and accordingly entered judgment for the United States. (R. 29.)

ARGUMENT

The sole question presented in this case is whether documentary stamps must be affixed to deeds used in lieu of foreclosure proceedings for the purpose of conveying property from defaulting mortgagors to the mortgagee. The decision of the court below,

holding that the consideration paid for the 44 conveyances here involved was the extinguishment of the mortgage debt and the release of the grantor from liability thereon and that such conveyances are subject to tax, is clearly correct.[2] The pertinent statutes—Schedule A 8 of Section 800 of the Revenue Act of 1926, as amended, *infra,* pp. 13-14, and Section 3482 of the Internal Revenue Code, *infra,* pp. 12-13, provide that the tax shall be measured by the consideration for the transfer or by the value of the interest conveyed or the value of the property conveyed. The stamp tax here imposed was computed upon the amount of the mortgage debt (reduced by any payments made by the mortgagor to the mortgagee), plus accrued but unpaid interest thereon, and any additional amounts paid by the mortgagee to the mortgagor. In each conveyance, the fair and reasonable market value of the property, as generally determined by the New York courts, exceeded the mortgage debt thereon. Also, in each instance, the grantor was personally liable on the mortgage debt.

Treasury Regulations 71 (1932 ed.) provide in Article 112,[3] *infra,* p. 15, that a conveyance by a defaulting mortgagor to the mortgagee in consid-

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[2] In 39 conveyances, the grantee gave a covenant to the grantor not to sue for a deficiency judgment and in the other 5 conveyances the grantee gave no covenant but, since the fair market value of the property exceeded the debt as determined by the New York courts, the mortgagee could not obtain a deficiency judgment and none was sought by the taxpayer against any mortgagor in this case.

[3] Section 113.83(c) of Treasury Regulations 71 (1941 ed.) is substantially the same.

eration of the cancellation of the mortgage debt is subject to tax calculated on the amount of the mortgage debt plus unpaid accrued interest. The court below held that Article 112 was a correct interpretation of the statute and that the taxes here involved were computed in accordance therewith. (R. 15.) The validity of Article 112 has also been upheld in *Railroad Federal Savings & Loan Ass'n* v. *United States,* 135 F. 2d 290, 293 (C.A. 2).

The taxpayer contends (Pet. 7-10) that the conveyance in each of these transactions was not a sale, and that only the cash consideration paid by the mortgagee above the mortgage debt should be subject to the stamp tax. The court below rejected this contention, holding that the consideration for the transfer included the amount of the mortgage debt. This conclusion finds support in *Crane* v. *Commissioner,* 331 U.S. 1, wherein this Court said (p. 13):

> We adhere, however, to what we have already said on the meaning of "property", and we find that the absurdity is avoided by our conclusion that the amount of the mortgage is properly included in the "amount realized" on the sale.
>
> * * * The cases so deciding have already repudiated the notion that there must be an actual receipt by the seller himself of "money" or "other property", in their narrowest senses. * * *

See also *Railroad Federal Savings & Loan Ass'n* v. *United States, supra,* and *Richter* v. *Commis-*

sioner, 124 F. 2d 412, wherein the Court of Appeals for the Second Circuit held that a transfer of property by the mortgagor to the mortgagee in lieu of foreclosure proceedings is a sale.

The taxpayer also contends (Pet. 10-11) that by the clause in the deeds that the mortgage was not to merge with the fee, the encumbrance was not removed by the transfer of the property. In effect, this is saying that although the taxpayer became owner of the property upon the conveyance it was indebted to itself for the amount of the mortgage debt or, in other words, that it was both mortgagor and mortgagee on the same property. The absurdity of this situation is at once apparent. Thus, the court below correctly determined that even though the mortgage was not cancelled by the conveyance the liability on the mortgage debt was nevertheless extinguished. (R. 16-17.) And it aptly pointed out (R. 16) that the procedure followed enabled the taxpayer to resell the property in consideration of the purchaser assuming the mortgage either in full or as it might be modified or renewed and thus escape liability for the New York tax imposed upon a new mortgage. In *Railroad Federal Savings & Loan Ass'n* v. *United States, supra,* and *Richter* v. *Commissioner, supra,* all the conveyances involved contained a similar clause that the mortgage was not to merge with the fee but was to remain as a lien on the property; but the Court of Appeals for the Second Circuit held, nevertheless, that the stamp tax was measured by the amount of the adjusted mortgage debt as determined by the Commissioner

of Internal Revenue. The taxpayer itself, by entering on its records as the cost to it of the properties the amount of the mortgage indebtedness plus costs of acquisition, treated the mortgage debt as having been removed by the acquisition. (R. 23.)

The suggestion of the taxpayer (Pet. 9) that the conveyances were abandonment of the security to the creditor is without merit. This question has been raised many times for the purpose of determining whether the loss sustained was deductible from income at the full amount or was a capital loss. In every case where the courts have held the property was abandoned, it was determined, contrary to the showing here, that the mortgagor was not personally liable on the mortgage debt; that his interest in the property had become worthless; and that he had advised the mortgagee he was abandoning his interest. *Stamler* v. *Commissioner,* 145 F. 2d 37 (C.A. 3d); *Commissioner* v. *Green,* 126 F. 2d 70 (C.A. 3d); *Stokes* v. *Commissioner,* 124 F. 2d 335 (C.A. 3d); *Commissioner* v. *Hoffman,* 117 F. 2d 987 (C.A. 2d).

In asserting (Pet. 11-12) that the instant case is the first time a court has undertaken to construe and apply Article 112 of Regulations 71 (1932 ed.), the taxpayer overlooks *Railroad Federal Savings & Loan Ass'n* v. *United States, supra,* where the Second Circuit considered that article and held, as pointed out above, that there was no reason to doubt its validity. In that case the court noted that an identical regulation had been in effect during several reenactments of the statute and that this

was persuasive evidence of Congressional approval. In this connection, the taxpayer suggests that the article expresses the measure of tax in a transaction in which *other* real estate, not the originally mortgaged real estate, is conveyed to the creditor. The argument is without force. A conveyance by a defaulting mortgagor to the mortgagee in consideration of cancellation of the mortgage debt can mean no other property than that upon which the mortgage was placed.

Taxpayer's assertion (Pet. 12-14) that the decision of the court below is in conflict with a decision of this Court and the decisions of several lower courts is also without substance. None of the cases cited by taxpayer can be said to be in point. *United States* v. *Seattle-First National Bank,* 321 U. S. 583, involved a consolidation or merger, and *Berry* v. *Kavanaugh,* 137 F. 2d 574 (C.A. 6), involved a transfer of real estate from the receiver of an insolvent insurance company to a re-insurer for the benefit of the policy holders of the insolvent. The three district court cases cited by taxpayer (Pet. 14) are not in point for similar reasons. In all of the five cases mentioned, the courts held that the transfers involved merely the conveyance of the bare legal title by operation of law. Since none of the cases cited by taxpayer involved a conveyance from a mortgagor to a mortgagee in lieu of foreclosure proceedings, it is plain that they are not in conflict with the decision of the court below.

CONCLUSION

The petition for a writ of certiorari presents no question warranting further review and should therefore be denied.

Respectfully submitted,

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AUGUST, 1953

APPENDIX

Internal Revenue Code:

SEC. 3480. IMPOSITION OF TAX.

There shall be levied, collected, and paid, for and in respect of the several bonds and other documents, instruments, matters, and things mentioned and described in sections 3481 and 3482, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, the several taxes specified in such sections.

(26 U.S.C. 1946 ed., Sec. 3480.)

SEC. 3482 [as amended by Sec. 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862; Sec. 209 of the Revenue Act of 1940, c. 419, 54 Stat. 516, and Sec. 505 of the Revenue Act of 1941, c. 412, 55 Stat. 687].[4] CONVEYANCES.

Deed, instrument, or writing (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This

[4] The rate of 50 cents in this section was changed to 55 cents by Section 210 of the Revenue Act of 1940, *supra*, and Section 521 of the Revenue Act of 1941, *supra*.

section shall not apply to any instrument or writing given to secure a debt.

(26 U.S.C. 1946 ed., Sec. 3482.)

Revenue Act of 1926, c. 27, 44 Stat. 9:

TITLE VIII.—STAMP TAXES

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. The taxes imposed by this section shall, in the case of any article upon which a corresponding stamp tax is now imposed by law, be in lieu of such tax.

* * * * *

SCHEDULE A.—STAMP TAXES

* * * * *

8. [as added by Sec. 725 of the Revenue Act of 1932, c. 209, 47 Stat. 169, and amended by Sec. 212 of the National Industrial Recovery Act of 1933, c. 90, 48 Stat. 195; by Joint Resolu-

tion of June 28, 1935, c. 333, 49 Stat. 431, and by Joint Resolution of June 29, 1937, c. 402, 50 Stat. 358] Conveyances: Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1939 (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt.

Treasury Regulations 71 (1932 ed.):

ART. 77. *Tax, how computed.*—In calculating the amount of stamps which must be affixed to a deed of conveyance, the tax is computed upon the full consideration for the transfer less all encumbrances which rest on the property before the sale and are not removed by the sale. Encumbrances placed on the property in connection with and as a result of the sale or transfer, as well as notes for deferred payments, can not be deducted in determining the amount upon which tax is calculated.

* * * * *

ART. 79. *"Sold" defined.*—The term "sold" imports the transfer of the absolute or general title for a valuable consideration or price.

* * * * *

ART. 112. *Conveyance by mortgagor to mortgagee.*—A conveyance by defaulting mortgagor to mortgagee in consideration of the cancellation of mortgage debt is subject to tax calculated on the amount of the mortgage debt plus unpaid accrued interest.

In Treasury Regulations 71 (1941 ed.), the above articles are designated as Section 113.81(b), Section 113.82 and Section 113.83 (c) and are substantially the same.

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